

## **OPD APPELLATE WINS - JANUARY TO APRIL 2010**

The Appellate Section of the OPD had many important wins in the first third of this year.

### **APPELLATE PROCEDURE**

Order finding abuse and neglect reinstated by the New Jersey Supreme Court. The Appellate Division found plain error in the admission of documentary evidence and the use of hearsay contained within the documents. The Supreme Court held that consistent with the doctrine of invited error, on appeal, the father may not protest the admission of the documents after he agreed to their admission at trial. The record is clear that defendant consented to the admission of the relevant documents. Indeed, the one document that defendant objected to, P-1, was not admitted into evidence. Importantly, by consenting to the admission of the documents, defendant deprived the Division of the opportunity to overcome any objection and deprived the trial court of the necessity to make a ruling based on the arguments presented by both sides. That is, if defense counsel had objected to the Screening Summary and other documents, and the trial court agreed with those objections, the Division could have taken steps to satisfy any evidentiary requirements needed for the admission of the documents or presented a witness or witnesses in place of the documents. Under those circumstances, defendant is barred by the doctrine of invited error from contesting for the first time on appeal the admission of the various documents. (DYFS v. M.C., III/ Matter of M.C. IV and N.C., March 31, 2010; James A. Louis, D.P.D., Law Guardian; Beatrix W. Shear, D.P.D., for M.C., III)  
<http://www.judiciary.state.nj.us/opinions/supreme/A9608DYFSvMCIII.pdf>

### **CONFESSIONS AND OTHER STATEMENTS**

Convictions reversed by the Appellate Division. Defendant primarily objected to the denial of his motions to suppress physical evidence seized by a New York parole officer during a search of his home and statements he made to New Jersey law enforcement officers. Accepting the judge's factual findings, the physical evidence was properly admitted but the statements defendant made during a meeting he requested to negotiate a plea should have been excluded pursuant to N.J.R.E. 410. The judge's factual findings compel the conclusion that N.J.R.E. 410 required exclusion of everything defendant said at the May 8 meeting. Accepting the State's proofs, he found: the presence of law enforcement officers at a meeting with defendant did not just happen but occurred because the meeting was orchestrated by defendant; defendant wanted to "run the show" and was "basically orchestrating what [was] going to happen"; he said "what he

want[ed] to say"; and "[h]e wanted to orchestrate a deal ... where everything was combined." Those findings do not permit any conclusion other than that defendant believed he was attending the meeting he wanted to have – a meeting to negotiate a global plea agreement resolving multiple burglaries committed in various counties. In short, the State cannot introduce evidence to convince the court that a suspect has volunteered statements and then avoid the legal implications that flow from the proofs presented. It was error to admit these statements after finding that the statements were made under circumstances in which they cannot be admitted in conformity with N.J.R.E. 410. (State v. Orion T. Brabham, April 30, 2010; Karen E. Truncale, A.D.P.D.)

### **CONFRONTATION**

Convictions reversed by the Appellate Division because defendant's constitutional right to confront the witnesses against him was violated when Christofferson failed to appear in court as directed and failed to submit to further interrogation by defense counsel on matters affecting her credibility. Christofferson was the lead witness called by the State and the only witness who directly identified defendant as the shooter. Impeaching her credibility as a witness was thus a key component of the defense's strategy. Reversing its earlier erroneous ruling, the court declared that defendant was entitled to question Christofferson about her open charge of shoplifting and have the jury consider whether her testimony in this trial may be "colored" to curry favor with the State on this seemingly unrelated matter. An equally relevant area of inquiry was information discovered by the prosecutor's investigator concerning Christofferson's possible use of other names or social security numbers. Upon discovering Christofferson's absence, an apparent willful disregard of the court's instruction to make herself available for further questioning, the court should have either adjourned the proceedings for a reasonable time to permit defense counsel and/or the prosecutor to locate her or, if she could not be produced for further questions, declare a mistrial. (State v. Tyrone Emmons, January 7, 2010; Robert L. Sloan, A.D.P.D.)

### **CRIMES AND OFFENSES – ELEMENTS**

Conviction for **distribution within a school zone** reversed by the Appellate Division. In his motion to dismiss the school-zone count, defendant maintained that a nursery school/kindergarten is not an "**elementary school**" within the meaning of N.J.S.A. 2C:35-7. The motion judge disagreed, finding that although the Goddard School was primarily a facility for pre-school children, it did have a kindergarten and thus came within the definition of an "elementary" school under the Education Administrative Code regulations, N.J.A.C. 6A:32-2.1, and "non-public" elementary

school, under N.J.A.C. 6A:9-2.1. The inclusion of "kindergarten" within the Education Administrative Code's definition of an "elementary school" does not render the Goddard School an elementary school for purposes of the criminal school-zone statute. Without any grade levels beyond kindergarten, the Goddard School is not an institution at which students fulfill their compulsory school-attendance requirements. Thus, while a facility that offers kindergarten in combination with higher grades qualifies as a "school" under our Education Administrative Code, it is the inclusion of those higher grades, at which attendance is compulsory, that causes the institution to be deemed a "school" for regulatory purposes and, by extension, an 'elementary school' for school-zone purposes. (Stephen W. Kirsch, A.D.P.D.)

### **CUMULATIVE ERROR**

The Appellate Division reverses the conviction and orders a new trial due to the cumulative effect of the compounding missteps that occurred in the Law Division that "appreciably erode our confidence in the jury's verdict." Significantly, because this case turned primarily upon the strength of the identification of defendant by the victim, the failure of defendant's trial attorney to press for and obtain a Wade hearing was a particular concern. Although defendant did not testify in his own defense at trial, he presented an alibi defense and challenged the State's claim that he was present at the time of the robbery. These circumstances, along with multiple potentially problematic identification procedures employed by the police should have triggered the request for such a hearing by defense counsel, unless there was a reasonable strategic reason not to do so. In addition, the trial court may have unintentionally misled the jury during deliberations through an uncorrected slip of the tongue, and certain comments of the prosecutor were clearly inflammatory. (State v. Eddie Valentine, February 2, 2010; Brian O'Reilly, Designated Counsel)

### **DEFENDANT'S PRESENCE/ABSENCE**

Convictions reversed by the New Jersey Supreme Court. Defendant Frank Dellisanti was on trial in Bergen County Superior Court when sheriff's officers from another county arrived to arrest him for an unrelated probation violation. The record is barren of any indication that defendant voluntarily waived his right to be present during answers to jury questions and the announcement of the verdict. In the exceptional circumstances presented here, the wishes, preferences, or convenience of sheriff's officers acting to arrest defendant during jury deliberations cannot be permitted to trump defendant's right under Rule 3:16(b) to insist on being present through to the trial's conclusion and the rendering of the verdict. Because the record does not establish that the Rule's conditions for waiver were satisfied, it follows that defendant's

right to presence under Rule 3:16(b) was violated, unfairly, through no action of his own. No decision has confronted a fact pattern akin to the present case, where a seemingly unwilling defendant was hauled from the courtroom by another vicinage's law enforcement officers while awaiting the jury's return from deliberating on his verdict, and thereby was deprived of the right, clearly granted him under Rule 3:16(b), to be present and face his jury when it returned its verdict. Moreover, to promote compliance with the Rule's salutary purposes and promises to criminal defendants in particular and to the public at large, in the future, the trial court must ensure that a warrant from another jurisdiction does not prevent a defendant from being present during his trial. If a defendant wishes to waive his or her presence mid-trial due to the intercession of law enforcement officers of any jurisdiction, the defendant's waiver must be on the record. The trial court must not cede control over his or her courtroom. See also **PROSECUTORIAL MISCONDUCT**. (State v. Frank G. Dellisanti, April 27, 2010; Daniel J. Brown, Designated Counsel) <http://www.judiciary.state.nj.us/opinions/supreme/A2909StatevDellisanti.pdf>

Conviction reversed by the Appellate Division. Based on one disruptive incident that occurred before the judge charged the jury, defendant was excluded from the courtroom during the court's charge to the jury and for the entire period of deliberations. Despite defense counsel's request shortly after defendant's initial removal, the judge did not bring defendant back to court to address him as to whether defendant was prepared to behave appropriately if allowed to return to trial. The Court's concern for this defendant's exclusion from the trial turned on the unusual facts of this case. In a statement to the police, defendant admitted that he asked the store clerk for money, but denied that he 'announced a robbery.' He also denied having a gun or pretending to be armed with a gun during the robbery. The witnesses testified that defendant said he had a gun and threatened to shoot the owner. But those allegations did not appear in any of the reports of the police officers who spoke to those witnesses. In the context of this case, defendant's continued exclusion from the trial was not harmless error. The jury obviously had questions about the case, as evidenced by its extensive requests for read backs. And the consequence of the jury's verdict could not be overstated. At age thirty-three, defendant faced life in prison without parole. On this set of facts, defendant's continuing exclusion from the courtroom, without giving him any further opportunity to repudiate his improper conduct and return to the trial, was plain error mandating reversal of his conviction. See also **SENTENCING - MISCELLANEOUS**. (State v. Michael Stuart, March 30, 2010; Amira R. Scurato, A.D.P.D.)

## **DEFENSES**

Conviction for possession of a firearm without a permit reversed by the Appellate Division. At trial, defendant asserted that he was arrested within one minute of picking up a handgun he found on the sidewalk to prevent danger to children and others, he never intended to keep the gun, and he had no opportunity to turn it in to the police before his arrest. A **common law defense of justification was presented by the evidence**, and it was relevant to opposing arguments regarding the one disputed issue in the case, defendant's intent. Justification as a defense required instruction to the jury, even in the absence of a request by counsel. In this case, the State argued that danger to nearby children and others was not imminent and compelling. Although there was no specific evidence of children or others who might have picked up the gun, other than the two elderly men, the immediacy of danger presented by a loaded handgun on a city sidewalk was a factual issue for the jury to determine. Defendant was entitled to the jury's consideration of a provision of the Code that recognizes a defense of justification to protect against a greater harm than his own allegedly temporary possession of the handgun without a permit. The jury instructions focusing the jury only on 'the time and opportunity to surrender the handgun,' and on whether defendant intended to do so, did not fully apprise the jury of the law regarding alleged justification for defendant's conduct. Charges on temporary possession and intent, combined with a charge on justification, would have fully informed the jury about the law applicable to the factual issues raised by the defense." See also **EVIDENCE**. (State v. Frederick L. Hunt, March 25, 2010; Kevin G. Byrnes, Designated Counsel)

#### **DOUBLE JEOPARDY**

Termination of parental rights affirmed by the Appellate Division. Defendant contended the court erred by adopting the findings in the Title 9 action that he abused or neglected his children and incorporating them against him in the guardianship trial. He argued that the court misapplied the doctrine of collateral estoppel to bar relitigation of the issue of abuse under the best interests of the child standard; ignored the exceptions to the general rule; and misinterpreted case law requiring separate litigation where proceedings required different standards of proof. While DYFS has the burden of establishing abuse or neglect in a fact-finding hearing by a preponderance of the evidence, N.J.S.A. 9:6-8.46(b)(1), the burden of proof in a Title 30 termination case is the clear and convincing evidence standard. When the underlying finding of abuse, however, is made by clear and convincing evidence and not merely by a preponderance of the evidence, it may support a termination of parental rights. The court in the abuse or neglect proceeding here applied the higher standard of clear and convincing evidence to determine that defendant sexually abused S.D. and that

this behavior placed the physical, mental, and emotional condition of all the children in imminent danger of being impaired. The fact finding in the abuse or neglect proceeding satisfied the first prong of the best interests standard in the termination proceeding. All of the requirements for collateral estoppel applied to bar relitigation: the issue of sexual abuse and its impact on the children was in fact litigated in the Title 9 action; defendant could have appealed the prior finding after Judge Johnson entered the disposition order; the determination of this issue was essential to the entry of judgment in the Title 9 action; and the parties essentially were identical. Judge Fineman properly employed collateral estoppel by adopting Judge Johnson's finding by clear and convincing evidence that defendant committed sexual abuse of S.D. when she was in his care and the other children were in the household. (DYFS v. R.D./Matter of K.D. and R.D., April 22, 2010; Thomas G. Hand, Designated Counsel, for R.D.; Lisa M. Black, Designated Counsel, Law Guardian)

Denial of PCR affirmed in part, reversed in part by the Appellate Division. Defendant was indicted on January 8, 1992 for various sexual offenses committed on his daughter, L.W., commencing in 1977 when the daughter was four and continuing to 1991. He also was indicted for committing an act of sexual assault on T.E., his daughter's friend, in violation of N.J.S.A. 2C:14-2b and committing an act of criminal sexual contact on T.E. in violation of N.J.S.A. 2C:14-3b. The assaults against T.E. occurred in 1979. Prosecution of defendant for the sexual assault committed on T.E. should have been barred. More than five years had elapsed between 1979 when the crime was committed and the passage in 1986 of the amended version of N.J.S.A. 2C:1-6 extending the statute of limitations for crimes violating N.J.S.A. 2C:14-2 and -3. Thus that amended statute of limitations did not serve to increase the period during which defendant could be prosecuted for this particular crime. Rather, prosecution was barred by N.J.S.A. 2A:159-2 and the initial version of N.J.S.A. 2C:1-6b. While the jury reached a verdict against defendant in connection with the time-barred claim that defendant sexually assaulted T.E., if the bar of the statute of limitations had been asserted then, the trial court would have been precluded from entering a judgment of conviction on the jury's finding of guilt. The sentence is no less illegal because the bar of the statute of limitations has only now been raised. (State v. E.W., April 27, 2010; Christopher J. Turano, Designated Counsel)

#### **DUE PROCESS OF LAW**

Termination of parental rights reversed, case remanded for rehearing and reconsideration by the Appellate Division. The most significant issue presented by this consolidated appeal from a judgment terminating parental rights is whether the part of a medical report containing a doctor's expert opinion was properly

admitted into evidence under Rule 5:12-4(d). DYFS's failure to provide that report to appellants or to give them any other notice before trial that DYFS was alleging that their child was born with fetal alcohol syndrome constituted a denial of due process. The allegation that T.B. had abused alcohol during her pregnancy with Z.B., thereby causing him to be born with fetal alcohol syndrome, was interjected into the case for the first time on the first day of trial when the court referred to the report in questioning DYFS's case worker and psychological expert. Therefore, appellants did not receive any notice of this charge before trial or even at the outset of the trial, thus depriving them of the opportunity of calling their own witness on the subject of fetal alcohol syndrome or examining whatever medical records Dr. Mehta may have reviewed in reaching this conclusion. This denial of notice of the allegation that Z.B. suffers from fetal alcohol syndrome constituted a deprivation of due process. Because there is no evidence Z.B. was born addicted to drugs, the detection of cocaine in Z.B.'s system would not be sufficient, by itself, to support a finding that Z.B.'s health or development had been or will continue to be endangered by the parental relationship. N.J.S.A. 30:4C-15.1(a)(1). Consequently, the trial court's erroneous admission of Dr. Mehta's report and reliance upon that report to find that Z.B. suffers from fetal alcohol syndrome did not constitute harmless error. Moreover, appellants' failure to object to the admission into evidence of Dr. Mehta's report would not warrant the conclusion that the introduction of this report constituted "invited error." Appellants' counsel were not expressly asked whether they had any objection to the admission of Dr. Mehta's report." See also EVIDENCE. (DYFS v. B.M. and T.B./Matter of Guardianship of Z.T.T.B., April 29, 2010; Carol Willner, Designated Counsel, for B.M.; Anthony J. Van Zwaren, Designated Counsel, for T.B.; Christopher A. Huling, A.D.P.D., Law Guardian)

#### EVIDENCE

D.J., the father of M.J., appealed from an order of a judge of the Family Part holding that he abused and neglected his four-year-old son by intentionally burning the child with an iron, an act that the judge found constituted excessive corporal punishment. The only corroboration present was provided by caseworker Llanos who testified that, while in the family's bedroom during the removal of the child by DYFS, she queried the already frantically shaking mother in whispered tones whether "what your four year old told me earlier is true," and she received a non-verbal shake of the head that Llanos interpreted as indicating assent. Even if the mother's head movement is regarded as a reliable hearsay statement by her, reported by Llanos, indicating the mother's agreement to the truth of some or all of her son's statements to the school, DYFS and the police, the Appellate Division found **no grounds for its admissibility as hearsay**. In the circumstances

presented, it is not, in large part, admissible as a statement offered against a party that is the party's own statement, admissible pursuant to N.J.R.E. 803(b)(1), since the admissibility of the statement is challenged by the father, not the mother. Nor is the 'statement' admissible as a statement against interest, admissible pursuant to N.J.R.E. 803(c)(25), since it is offered against the father, not the mother. Additionally, the Court rejected the law guardian's argument that the mother's non-verbal response constitutes an excited utterance, admissible pursuant to N.J.R.E. 803(c)(2), finding ample opportunity in the circumstances presented for deliberation or fabrication on the mother's part. State v. Branch, 182 N.J. 338, 366-67 (2005). See also **GUARDIANSHIP/TERMINATION OF PARENTAL RIGHTS**. (DYFS v. D.J./Matter of M.J., a Minor, April 13, 2010; Laura M. Kalik, Designated Counsel, for D.J.; Noel C. Devlin, A.D.P.D., Law Guardian)

Termination of parental rights reversed, case remanded for rehearing and reconsideration. The most significant issue presented by this consolidated appeal from a judgment terminating parental rights is whether the part of a **medical report containing a doctor's expert opinion** was properly admitted into evidence under Rule 5:12-4(d). Such a report **constitutes inadmissible hearsay** unless the Division of Youth and Family Services (DYFS) establishes all the prerequisites of N.J.R.E. 803(c)(6) for its admission as a business record and that DYFS failed to establish those prerequisites regarding the medical report introduced into evidence in this case. DYFS did not lay a foundation for admission of Dr. Mehta's report under N.J.R.E. 803(c)(6) at trial and DYFS does not argue on appeal that the report could qualify for admission under this evidence rule. Instead, DYFS argues that an expert opinion contained in a report of a DYFS-retained professional consultant may be admitted under Rule 5:12-4(d) without satisfying the prerequisites for admissibility set forth in N.J.R.E. 803(c)(6). However, the plain language of Rule 5:12-4(d), the prerequisites for the adoption of evidence rules under the Evidence Act of 1960, N.J.S.A. 2A:84A-33 to -44, and the constitutional constraints imposed upon a state that brings an action seeking termination of parental rights, all lead to the conclusion that a report offered into evidence under Rule 5:12-4(d) may be admitted only if it satisfies the prerequisites for admissibility set forth in N.J.R.E. 803(c)(6). See also **DUE PROCESS OF LAW**. (DYFS v. B.M. and T.B./Matter of Guardianship of Z.T.T.B., April 29, 2010; Carol Willner, Designated Counsel, for B.M.; Anthony J. Van Zwaren, Designated Counsel, for T.B.; Christopher A. Huling, A.D.P.D., Law Guardian)

Conviction reversed by the Appellate Division because the trial court erred by allowing the State to present **expert evidence on Battered Woman Syndrome (BWS)**. The Court found no case where expert testimony respecting the characteristics of a battered woman



and BWS was presented in the absence of any evidence of a coercive control pattern and its effects and an expert opinion as to whether the victim was battered. The opinions offered by Dr. Lischick were simply not sufficient to be relevant to the facts of this case. Here, the testimony of Dr. Lischick merely established that battered spouses may falsely recant their accusations. It did not tend to prove that this victim's recantations were false because Dr. Lischick did not opine that the victim was a battered spouse. Even if the victim's statement that she feared defendant's physical reactions to not getting his way may have been relevant to an expert opinion that she was a battered spouse, and we do not doubt that it might be, Dr. Lischick never opined the victim was a battered spouse. And it is clear from the whole of Dr. Lischick's testimony that this determination requires expertise beyond the ken of the average juror. Without such an opinion, the scientific fact that battered women tend to recant their accusations did not tend to prove that this victim's recantations were false. There was no logical connection between the proffered evidence and the fact at issue – the falsity of the exculpatory statements. As a result, Dr. Lischick's testimony was not relevant, admissible evidence and the judge erred in admitting it. See also PROSECUTORIAL MISCONDUCT. (State v. J.I.F., March 4, 2010; Michael C. Kazer, Designated Counsel)

Convictions reversed by the Appellate Division because the State was permitted to **impermissibly bolster D.C.'s [a jailhouse informant] credibility by calling a series of witnesses**, all of whom represented the State in some official capacity, and **all of whom expressly or implicitly, opined that D.C. was truthful**. The jury was likely to accord the testimony of these witnesses special respect because of the positions they occupied in our criminal justice system. Caulfield and Elflein were assistant prosecutors from other counties, who, like the trial prosecutor, were duty-bound to assess the merits of a criminal case and, hence, the credibility of potential witnesses. Egels, by the exercise of his official duties, determined whether D.C. remained in custody or was released with conditions. Their testimony became fodder for much of the prosecutor's argument to the jury regarding D.C.'s credibility. In his summation comments regarding this testimony and his own role at D.C.'s parole revocation hearing, the prosecutor suggested to the jury that D.C. should be believed because his knowledge of events could only have come from conversations with defendant. Like Elflein did regarding the Essex County prosecution, so, too, this prosecutor effectively 'testified' that he reached a similar conclusion regarding the accuracy of D.C.'s information in this case; having done so, he appeared before Egels to support D.C.'s release. Viewed in its totality, the testimony and summation comments of the prosecutor amounted to an expression of a personal belief or opinion as to the truthfulness of his witness's testimony, and that is prohibited.

The State's improper vouching for D.C. must have affected the jury's consideration of his testimony. (State v. Brian Fowlkes, January 7, 2010; Daniel V. Gautieri, A.D.P.D.)

Appellate Division judgment allowing admission of **cleric-penitent communications** into evidence reversed by the New Jersey Supreme Court. The cleric-penitent privilege applies when, under the totality of the circumstances, an objectively reasonable penitent would believe that a communication was secret, that is, made in confidence to a cleric in the cleric's professional character or role as a spiritual advisor. An objective reasonableness standard that allows for consideration of all the facts lends itself to the varied exchanges between clerics and penitents. Indeed, the nature of those conversations may be as diverse as the individuals who engage in them. An objective approach also separates idiosyncratic views from reasonable ones and disregards subjective thoughts that are not conveyed. In addition, a fact-sensitive analysis avoids bright-line rules that would extend the privilege to all communications between a penitent and a cleric, regardless of whether they meet the statutory test. The trial court appropriately "look[ed] at the big picture" -- the totality of the circumstances -- but the record does not reveal the test it applied. The Court concluded that there was ample support in the record for the court's conclusion that the privilege applied. (State v. J.G., ? N.J. ?, 2010 N.J. LEXIS ? (April 7, 2010) Mark H. Friedman, A.D.P.D.)

Convictions reversed by the Appellate Division. Evidence was presented to the jury that the police had conducted a month to a month and one-half long surveillance of the activities at Banks's apartment that first focused on Banks but later focused on defendant, as well. During the course of that surveillance, defendant was observed as the seller in a hand-to-hand transfer of drugs, a criminal act, and that act constituted part of the evidence used by the police to establish probable cause for the issuance of warrants to search the apartment and defendant's person. Additionally, controlled purchases from defendant had taken place. As the result of the police's investigation and the evidence thus garnered, court-authorized warrants were issued, leading to the discovery, not only the cocaine and heroin that formed the basis for the indictments, but also marijuana, providing the basis for another uncharged crime. Defense counsel did not object to the introduction of any of this evidence, and indeed, solicited the majority of it. Defense counsel sought, by examining Buckley regarding his surveillance, to elicit testimony that would implicate Banks as possessor of the drugs found in Banks's apartment and would exculpate defendant. The opposite occurred, since defense counsel's questions led to the disclosure that Buckley had witnessed defendant as the transferrer in a hand-to-hand transfer of drugs. Even if a proper basis for introduction of

other crimes evidence had been identified and accepted, the trial judge must instruct the jury on the limited purpose for which the evidence is admissible and must inform the jury of the uses of the evidence that are prohibited. This did not occur. Rather, the judge merely gave a contemporaneous instruction to the jury that it must focus on the crimes charged in the indictment. In the circumstances presented, the **combination of introduction of other crimes evidence with evidence that probable cause for the issuance of warrants had been established on the basis of evidence that was not presented to the jury was sufficient to create a real possibility of an unjust result**, thereby constituting plain error.

While much of the evidence was introduced through the efforts of defense counsel, the errors committed were sufficient to cut mortally into defendant's substantive rights. (State v. Darryl T. Hester, March 18, 2010; Frank M. Gennaro, Designated Counsel)

Conviction for possession of a firearm without a permit reversed by the Appellate Division. The prosecution presented the disputed evidence that two witnesses to defendant's taking of the gun would not give police their addresses because they "were in fear for retaliation because they didn't know if the individual was involved in a gang or a drug deal" in response to defense cross-examination of Officer Kelly about the absence of addresses or phone numbers in his police report for the two elderly men to whom he spoke immediately before apprehending defendant. Defendant argued on appeal that the redirect testimony of the officer contained prejudicial hearsay that attributed criminal conduct to him, namely, it implied that defendant was involved in gang or drug dealing activity and might retaliate against the two men. The testimony objected to was neither hearsay nor evidence of other crimes that should have been excluded under N.J.R.E. 404(b). Nevertheless, reference to retaliation and gang or drug dealing activity should have been excluded because its probative value was substantially outweighed by the potential that it would unfairly prejudice defendant. N.J.R.E. 403. Defendant was not accused of any criminal activity other than the alleged unlawful possession of the gun. Injecting the specter of possible retaliation and gang or drug dealing activity into the trial was highly prejudicial to defendant. At the same time, the probative value of the two men's statements was limited to collateral issues regarding the Officer Kelly's credibility and competency, but those issues were not particularly relevant to defendant's guilt or innocence. Here, the State's need to explain the absence of addresses for the two men could have been satisfied by simply stating that the men would not give their addresses, without adding their reasons. See also **DEFENSES**. (State v. Frederick L. Hunt, March 25, 2010; Kevin G. Byrnes, Designated Counsel)

Conviction reversed by the Appellate Division because it agreed with defendant's claim that because he had no intervening

convictions, this **seventeen-year-old conviction was so stale that its probative value was vastly outweighed by its prejudicial effect, and the judge therefore erred by permitting the State to use it to impeach his credibility.** At a hearing outside the presence of the jury, the judge ruled that the State would be permitted, pursuant to State v. Sands, 76 N.J. 127, 144 (1978), to impeach defendant's credibility, if he took the stand, with his 1990 conviction for possession of CDS with intent to distribute. However, because of the similarity of the 1990 conviction to the charge for which defendant was on trial, the judge ordered the conviction sanitized. The only reported decision ever to have permitted a defendant to be impeached with a conviction nearly as old as this one was State v. Paige, 256 N.J. Super. 362, 371-73 (App. Div.), certif. denied, 130 N.J. 17 (1992), in which the State was permitted to impeach the defendant's credibility with a conviction that had occurred sixteen years earlier. However, the decision in Paige does not support the State's argument here that the judge's decision was correct. In Paige, the sixteen-year-old conviction was for murder. Obviously, the more serious the prior conviction, the greater its probative value. Defendant's prior conviction here cannot be said to be of that character, as he received only a probationary sentence at the time of his 1990 conviction.... The judge's decision permitting the State to impeach defendant's credibility with this seventeen-year-old sanitized conviction, when defendant had no intervening prior convictions, represented a mistaken exercise of the judge's discretion because the probative value was vastly outweighed by its prejudicial effect. See also **PROSECUTORIAL MISCONDUCT.** (State v. Karl Lester Murphy, April 22, 2010; Stephen A. Caruso, A.D.P.D.)

Convictions reversed by the Appellate Division based on cumulative effect of improper admission of evidence and prosecutor's improper statements in opening and closing arguments. The State's expert witness was permitted to describe his narcotic investigative activity, including undercover purchases and subsequent surveillances, involving 690 South 20th Street and the immediate area. The prosecutor specifically referenced this aspect of Holloway's testimony in her summation. These aspects of Holloway's testimony involved opinions about facts that were not beyond the ken of average jurors, or reasonable inferences that the average juror could reach without any expert testimony. For example, that the drugs found in the toilet were the remnants of an ill-fated attempt to dispose of evidence was fairly obvious to the average person, and an expert was not needed to explain that to the jury. Holloway's suggestion that other drugs had already been disposed of by defendant, implying he originally possessed more than were found, was unsupported by the record. The expert testimony was further **tainted by the references Holloway made to prior and subsequent drug transactions and investigations at the premises.** That the State's case was formidable only demonstrates

how unlikely it was that the jury could not have determined on its own without expert testimony that an individual possessing over seven-hundred bags of heroin intended to distribute some or most of them. See also **PROSECUTORIAL MISCONDUCT**. (State v. Darryl Proctor, January 5, 2010; Daniel Brown, Designated Counsel)

#### **GUARDIANSHIP/TERMINATION OF PARENTAL RIGHTS**

D.J., the father of M.J., appealed from an order of a judge of the Family Part holding that he abused and neglected his four-year-old son by intentionally burning the child with an iron, an act that the judge found constituted excessive corporal punishment. The Appellate Division found that DYFS failed to present a prima facie case of abuse and neglect on the part of the father in this case, having failed to corroborate the child's statements regarding the father's conduct with reliable, admissible evidence. The only corroboration present is provided by caseworker Llanos who testified that, while in the family's bedroom during the removal of the child by DYFS, she queried the already frantically shaking mother in whispered tones whether "what your four year old told me earlier is true," and she received a non-verbal shake of the head that Llanos interpreted as indicating assent. But in the present case, there is no evidence that the mother intended that the movement of her head, whatever it may have been, would be interpreted as a statement, particularly since, on all other occasions, the mother denied that the father was the perpetrator and either expressed no knowledge of how the burn had occurred, or provided scenarios that did not involve the father. Moreover, the child not only stated that the father burned him, but also that the mother was present and was ineffectual in her efforts to stop the father. Nothing in the record suggests whether the mother's alleged acknowledgment of the truth of her son's statement referred only to the circumstances of the burn, referred to the mother's conduct, or referred to both. As a consequence, evidence of reliability, required by case law, is absent here. See also **EVIDENCE**. (DYFS v. D.J./Matter of M.J., a Minor, April 13, 2010; Laura M. Kalik, Designated Counsel, for D.J.; Noel C. Devlin, A.D.P.D., Law Guardian)

Denial of motion to vacate kinship legal guardianship affirmed by the New Jersey Supreme Court. Pursuant to N.J.S.A. 3B:12A-6(f), prior to the vacation of a kinship legal guardianship judgment, the court must find by clear and convincing evidence both that the parent has overcome the incapacity or inability to care for the child that led to the original guardianship proceedings, and that termination of kinship legal guardianship is in the best interest of the child. Additionally, the party seeking to terminate the kinship legal guardianship has the burden to prove by clear and convincing evidence each of those two criteria. (DYFS v. L.L./In the Matter of T.L., February 24, 2010; T. Gary Mitchell, D.P.D.,

for L.L.; Melissa R. Vance, A.D.P.D., Law Guardian)

Finding of abuse and neglect affirmed by the Appellate Division. N.S. raised a preliminary procedural question. She argued she should be permitted to appeal the finding of abuse and neglect and the resultant removal of J.B. and K.B., notwithstanding her consent to an order for Kinship Legal Guardianship (KLG) that ended the litigation with respect to these children. Neither N.S. nor R.B. appealed from the final order awarding KLG. N.S. maintains that, although she accepts the KLG determination, she never assented to the abuse and neglect finding. A factfinding order, such as the one sought to be examined in this appeal, is considered interlocutory and requires a motion for leave to appeal. Despite this generally sound procedure, its application is unsatisfactory in this instance and in other Title Nine matters. To suggest litigants must request leave to appeal factfinding orders entered early in the proceeding, or be forever barred from challenging them if the litigation ends acceptably, ignores the significant consequences flowing from an adverse finding of abuse and neglect. Granting leave to appeal from the interim finding is unnecessarily disruptive and unreasonably causes delay in the dispositional review and family reunification, which is often the desired outcome of Title Nine litigation. There will be instances where the interests of justice demand a litigant's ability to challenge an interim finding for which leave to appeal was not sought, notwithstanding an acceptable final order closing the litigation. As the consequences of an adverse factfinding determination often are distinctly different from those of a final dispositional order, it is necessary to set forth a process, which allows parents the opportunity to fully preserve their rights, yet allows the Division to expeditiously proceed with disposition of the Title Nine matter for the benefit of the family and, more importantly, the interests of the children the action is intended to serve. Therefore, defendants in these actions should reserve the right to challenge any interlocutory finding of abuse or neglect notwithstanding their agreement to an acceptable resolution of the litigation. (DYFS v. N.S. and R.B./Matter of K.A.N., J.B., and K.B., April 14, 2010; Mary Potter, Designated Counsel, for N.S.; G. Christopher Kilbride for R.B.; Carol A. Weil, Designated Counsel, for respondent J.N.; Joyce Maraziti, Designated Counsel, Law Guardian)

#### **GUILTY PLEAS**

Denial of motion to withdraw guilty plea reversed, case remanded for further proceedings by the Appellate Division. Defendant filed a motion to withdraw his guilty plea on the grounds that he had learned of the State's intent to pursue new charges against him based upon his stepdaughter's claims, revealed in July 2006, that defendant had engaged in sexual activity with her in

addition to taking the photographs. Defense counsel certified that, "[h]ad defendant known at the time of his guilty plea that just two months later [his stepdaughter] would accuse him of sexual assault, allegations which he vehemently denies, he never would have entered a guilty plea to the taking of the photographs." The trial judge noted that the "[S]tate was unaware of the more serious charges until after the guilty plea was entered...." The judge did not address, however, whether or not the intervening event of the second indictment charging the more serious offense of first-degree aggravated sexual assault, had any bearing upon defendant's plea with respect to the knowledge which informed his decision to enter into that plea. Nor did the judge address defendant's colorable claim of innocence that counsel represented was set forth in the letter defendant ultimately decided not to submit to the court. Defendant is entitled to the benefit of a hearing pursuant to the Supreme Court's recent decision in State v. Slater, 198 N.J. 145 (2009), which was decided during the pendency of defendant's appeal. (State v. Jerry P. Bush, March 31, 2010; Raquel Y. Bristol, A.D.P.D.)

The Appellate Division concluded that State v. Garcia, 320 N.J. Super. 332 (App. Div. 1999) requires an evidentiary hearing on defendant's petition. Therefore, we vacate the order denying the petition and remand for a hearing at which defendant and his trial counsel may be called to testify regarding their communications about defendant's citizenship status and risk of deportation and the effect of those communications upon defendant's decision to plead guilty. The trial court should not simply have assumed that defendant's trial counsel was "under the impression that [defendant] was a citizen and did not face deportation[,] " even though defendant's certification alleged that he "informed [his trial counsel] when we first met that I was not a citizen." Instead, the court should have adduced testimony from both defendant and his trial counsel regarding their communications about defendant's citizenship status and the effect of those conversations upon defendant's decision to plead guilty. (State v. Thelfas Cooper, March 18, 2010; Mark Zavotsky, Designated Counsel)

Conviction and sentence vacated by the Appellate Division. Because the judge failed to comply with any of the requirements of Rule 3:9-2, there was no need to address the factors identified by State v. Slater, 198 N.J. 145 (2009)] as informing a decision as to whether a defendant is entitled to withdraw a plea. Rather, the Court vacated defendant's conviction and remanded the matter, restoring the parties to their pre-plea posture. See also **SENTENCING - MISCELLANEOUS**. (State v. Bodie Ellis, February 9, 2010; Jay L. Wilensky, A.D.P.D.)

#### **INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)**

State v. Kurt Lutchman, unpublished opinion, App. Div. Docket No. A-2745-08T4 (April 6, 2010) - Murder conviction reversed, case remanded for new trial. "In challenging his conviction on PCR, defendant contends that his trial attorney failed to inquire as to the significance of an autopsy finding that the victim had an arteriovenous malformation (AVM) and to consult with a forensic pathologist. Had counsel done so, he would have discovered that there was medical support for the position that Carol's death was not a homicide caused by blunt force trauma, as testified to by the then Bergen County Medical Examiner, but rather the result of a ruptured AVM which led to the subarachnoid hemorrhage causing death... [D]efendant has shouldered his burden on prong one related to his trial counsel's failure to consult a medical expert regarding the AVM issue and to present this aspect of the causation issue to the jury... [T]rial counsel, during both cross-examination and his summation, argued that there was reasonable doubt regarding whether defendant's blows caused the hemorrhaging in his girlfriend's brain because none of her bones were broken. Having already decided to present alternative and conflicting theories to create a reasonable doubt as to defendant's guilt and expressly having already pursued the causation argument, it was not within the wide range of professionally competent assistance to ignore the AVM finding in the autopsy report and what it could have led to if further explored by consulting a pathologist. Here, it was not merely ignored, defense counsel did not even understand what AVM meant and did not bother to find out. The defense of causation could have been supported by scientific testimony which would have strengthened the defense immeasurably... Defendant's trial counsel was ineffective because there would have been a reasonable probability of a different result if defendant had presented expert testimony that defendant's blows to his victim could not have directly caused the brain hemorrhages which killed her and that instead the hemorrhages were caused by a burst AVM... While we can only speculate as to how defense counsel might have altered his trial strategy had he engaged a forensic pathologist, it would not be surprising if the defense was less diffused - blaming others for the attack, intoxication, and causation - and more focused on the causation issue in an effort to create reasonable doubt in the jurors' minds. In any event, we are persuaded that defendant has satisfied the second prong of the Strickland test. We lack confidence in the jury's murder verdict." (David A. Ruhnke)

<http://www.judiciary.state.nj.us/opinions/a2745-08.pdf>

#### **INTERSTATE AGREEMENT ON DETAINERS (IAD)**

Dismissal of indictment for violation of IAD affirmed by the Appellate Division. The Court declined the State's request that it reconsider its earlier determination that the continuance issued to the State -- which resulted in a lengthy relaxation of the 120-day IAD time limit -- was improvidently granted and should therefore be



disallowed. Additionally, it rejected the State's argument that Judge Falcone erred when he concluded that the IAD time limit expired before defendant would have been released from confinement on his New York sentence. The judge's decision on remand gave the State the benefit of a generous 123-day tolling period for the submission of briefs on defendant's motion to suppress and for scheduling and conducting the motion hearing. Even with the benefit of that 123-day tolling, the 120-day IAD time limit was violated. Nothing the State has presented alters the fact that the State, having transported defendant to New Jersey, was obligated to commence his trial within 120 days of his arrival, excluding the tolling periods, but did not do so. The charges upon which defendant was convicted at trial are extremely serious. For that reason, the State should have been especially careful to adhere to the requirements of N.J.S.A. 2A:159A-4(c). To the contrary, the first time the State initiated any discussion of possible trial dates was September 7, 2006, which was the return date of defendant's motion to dismiss the indictment. The IAD statute demands far more. (State v. Shakur Carrasquillo, February 17, 2010; Michael Confusione, Designated Counsel)

#### **JURY INSTRUCTIONS**

Conviction reversed by the Appellate Division following remand to reconsider affirmance in light of State v. Hill, 199 N.J. 545 (2009). The present case is comparable to Hill. Defendant explained to the police that he was in the area where the heroin was found for a benign reason, to visit his cousin. He contended that his cousin had requested defendant to come there to help her with some shopping for her child. Defendant repeated this contention when he testified at his trial. Defendant's reference to his cousin was, as in Hill, designed to corroborate his "claim of innocent intent." Applying the new rule of law set forth in Hill to this case, which was in the appellate pipeline when Hill was decided, ... , the **adverse inference charge** given by the trial court was improper. (State v. William A. Brown, Jr., (March 11, 2010; Ronald Appleby, Designated Counsel)

#### **JURY ISSUES - MISCELLANEOUS**

Conviction reversed by the Appellate Division. The judge should not have granted defendant's application to waive a jury. It is clear from Jones's testimony that defense counsel did not provide him with advice of counsel respecting the advantages and disadvantages of waiving a jury nor did she explain the procedural safeguards during jury selection to avoid empanelling a prejudiced juror. Rather, she merely assumed that defendant knew what he was doing in waiving a jury simply because he was an intelligent and articulate man. Clearly, counsel gave defendant no advice at all about waiving a jury and absent such advice, there is no record

support for the judge's conclusion that the waiver was a knowing one." (State v. Tyrone Henry, January 5, 2010; William Welaj, Designated Counsel)

Order granting new trial based on **juror misconduct** affirmed by the Appellate Division. The trial court found juror S.W.'s comments to State's witness Detective Fine during a break in the trial, and the points of view expressed therein, had the capacity of undermining the reliability of the jury's verdict. Specifically, the comments "you did fine" and either "the defense lawyer was kind of crazy" or "defense attorneys can be assholes" revealed that S.W. had "a preconceived notion about criminal defense attorneys, a bias, a predisposition that certainly should have been revealed during voir dire." The Appellate Division agreed that S.W.'s bias or hostility against either this particular defense counsel, or criminal defense attorneys as a class, if disclosed during voir dire, would have most likely resulted in his exclusion from this jury panel based on counsel's exercise of one of her preemptory challenges. Indeed, such bias would have constituted sufficient grounds to excuse S.W. for cause. The State's argument that the trial court erred in failing to interrogate the other eleven jurors to ascertain whether S.W.'s bias tainted the entire jury ignored defendant's constitutional right to a fair and impartial jury, which requires that all twelve jurors adhere to their oath to scrupulously follow the court's instructions on the law and to base their ultimate judgment only on the evidence presented in court. (State v. Jamal R. Taylor, March 2, 2010; Cecelia Urban, A.D.P.D.)

### **JURY SELECTION**

Case remanded by the Appellate Division because defendant established a prima facie case of purposeful discrimination in the prosecutor's exercise of preemptory challenges to excuse seven African-American prospective jurors. Defendant satisfied the first step of the three-step Gilmore test and the court should have required the prosecution to proceed to articulate clear and reasonably specific explanations for the excusal of the seven African-American jurors. Of her twelve preemptory challenges provided by Rule 1:8-3(d), the prosecutor excused nine jurors, seven of whom were African-Americans, as is defendant. The use of seven of a total of nine preemptory challenges the prosecution exercised to excuse African-Americans is evidence that the prosecutor excused a cognizable class of prospective jurors. The excusal of these seven African-Americans is also evidence that the prosecutor used a disproportionate number of preemptory challenges against this cognizable group. The Court did not agree with the argument advanced by the State that the proportionality analysis is based upon the total number of African-Americans finally seated, which in this case was five. While the composition of the jurors ultimately seated is a factor the court may consider in the third

step of the process in weighing whether a defendant has met the ultimate burden of proving impermissible discrimination, it is not a factor that weighs against the defendant insofar as establishing a prima facie case. (State v. Saladin Thompson, March 25, 2010; Stephen P. Hunter, A.D.P.D.)

#### **POST-CONVICTION RELIEF (PCR)**

Denial of PCR petition reversed, case remanded for evidentiary hearing by the Appellate Division. Relaxation of the five-year time bar is warranted under these extraordinary and unique facts.

See R. 3:22-12(a). The parties assume that the petition was filed thirteen years after the entry of judgment. While dated August 20, 1993, so as not to deprive defendant of institutional credits as of that day, defendant was resentenced on the second remand on February 13, 1998. The judgment which was ultimately sustained was entered that day. It constituted the judgment of conviction which defendant now attacks. See R. 3:21-5(b). That judgment, and that judgment only, was affirmed on April 13, 1999, and the petition of January 31, 2000, was filed within five years of the 1998 judgment. Moreover, there was an earlier petition dated December 28, 1998, which defendant endeavored to file even before the proceedings on direct appeal concluded on April 13, 1999. Under the totality of these circumstances in which defendant sought PCR even before the direct appellate process was complete, and given Dr. Greenfield's report, which opined that defendant's "mental condition" was "excusable neglect" for his failure to file his petition within time, the petition should be considered on the merits. (State v. G.C., April 6, 2010; Joan E. Love, Designated Counsel)

Denial of PCR because it was filed beyond the time limits in R. 3:22-12 reversed by the Appellate Division, case remanded for evidentiary hearing. The Court disagreed with the judge's conclusion, made without holding a plenary hearing, that the overall circumstances of this case do not present the type of "exceptional circumstances" that would warrant relaxation of the rule's time limitations. The identity of the defendants was a crucial issue at the trial. Although the conviction was affirmed, doing so required "fine balancing" because of trial errors related to that issue. Finally, a different Law Division judge granted relief to the co-defendant on the same grounds articulated by Grice, which decision was for some reason not challenged by the State on appeal. A relaxable procedural bar should not prevent him from having the opportunity to seek the same relief based upon the merits of his claims under the very unusual and particular circumstances of this case. (State v. Raymond Grice, April 8, 2010; Adam W. Toraya, Designated Counsel)

Denial of PCR reversed, case remanded by the Appellate Division. As the record clearly shows, PCR counsel's performance

here was limited to presenting the arguments identified by defendant in his pro se submissions. There is no evidence that counsel conducted an independent evaluation of defendant's case to determine whether there were other grounds to attack defendant's conviction. Indeed, it is doubtful that PCR counsel even reviewed the file in this case. Assigned counsel's perfunctory performance here failed to meet the standards articulated by the Supreme Court in State v. Webster, 187 N.J. 254 (2006) and Rule 3:22-6(d). Under these circumstances, the Court was compelled to remand this matter for a new hearing. (State v. Mark Hicks, January 22, 2010; Anderson D. Harkov, Designated Counsel)

Denial of PCR reversed by the Appellate Division, case remanded for new hearing. Defendant contended that he was constructively denied his right to counsel at his PCR hearing because PCR counsel did not consult with him, failed to raise the issues he requested, and submitted a brief so deficient that PCR counsel appeared to be arguing the facts of a case other than his case. For example, PCR counsel wrote in the brief that "[n]o statements were collected from the victims, there were no interviews conducted of people who witnessed the alleged crime, and there were [no] statements taken from the victim indicating that she was not injured from the actions of [defendant]." However, there was only one victim in this case, the victim was a male, and he died as a result of the incident. PCR counsel also raised issues not supported by the record, i.e., that defendant should have received rehabilitation, rather than prison, for a murder conviction. PCR counsel violated Rule 3:22-6(d) by failing to present all of defendant's PCR petition claims, and by filing a deficient brief. Accordingly, this matter must be remanded for a new PCR hearing. (State v. Jamal Muhammad, March 31, 2010; Timothy P. Reilly, Designated Counsel)

Denial of PCR remanded for evidentiary hearing by the Appellate Division. Defendant sought "discovery and inspection of all investigations into misconduct by the Safe Cities Task Force and its past members ...." Defendant argued that the PCR judge erred in denying his motion for discovery because that discovery was vital to establishing that his trial counsel provided ineffective assistance to him when she failed to refile his motion for a new trial. The judge was clearly mistaken in denying discovery based on counsel's presumed trial strategy to avoid having defendant take the stand because the issue was really whether she could have discovered evidence based on the Star Ledger article to directly impeach Cantalupo and Badim. It is clear from counsel's cross-examination of Cantalupo and Badim that the theory of the defense at trial, before anyone saw the Star Ledger article, was that defendant was merely walking down the street and never had possession of the drugs. Counsel suggested that the officers had the drugs with them or found them somewhere on the street and

planted them. The large number of inconsistencies in their testimony and their inability to recall many of the details of their investigation was quite troublesome. The information contained in such documents would directly bear on whether his counsel was ineffective in failing to refile the new-trial motion and whether he was prejudiced by his counsel's failure to do so. Without the PCR discovery sought, defendant could not possibly satisfy either prong of Strickland. (State v. Al-Tariq Witcher, January 12, 2010; Timothy P. Reilly, Designated Counsel)

#### **PRE-TRIAL INTERVENTION (PTI)**

Denial of PTI reversed by the Appellate Division, case remanded for reconsideration by the prosecutor. The Prosecutor's rejection of defendant's application for PTI included irrelevant factors and failed to sufficiently demonstrate a careful consideration of the facts in light of the applicable law. The Court also was not persuaded by the Prosecutor's renunciation of the prior inadvertent revelation of an informal policy to reject PTI applications of all Megan's Law offenders. The State's denial of the existence of such an improper policy is belied by the justification analysis submitted. Pervading the Prosecutor's decision to deny defendant's application is an expressed emphasis on his juvenile adjudication and Megan's Law violation, rather than an analysis of the facts surrounding whether the offense warrants PTI consideration. When pressed during argument, the Prosecutor could not suggest any Megan's Law offender worthy of PTI admission except defendant's brother, who was admitted only after we affirmed the trial court's determination to vacate the Prosecutor's rejection. Moreover, the State has inaccurately skewed the facts of defendant's juvenile adjudication to apply factor one, failed to review defendant's assertion that he properly registered in Newark when he moved, possibly eclipsing the conclusion defendant willfully evaded his Megan's Law registration requirements, omitted ameliorating information evincing defendant's amenability to correction, misinterpreted factor seven by casting society as the victim of defendant's victimless offense, and disregarded an individualized analysis of defendant's reasonable prospects of rehabilitation with the purposes of PTI. (State v. E.A., March 17, 2010; Susan Brody, A.D.P.D.)

Denial of PTI reversed, case remanded for reconsideration by the Appellate Division. The prosecutor relied upon an inapplicable presumption in denying PTI: that defendant "deliberately committed with violence or threat of violence against another person." The grand jury indicted defendant and charged him with one crime - possession of a handgun without having first obtained a permit. The presumption did not apply. Because it is not clear whether the prosecutor would have denied the application if the prosecutor had not relied upon the inapplicable presumption, the matter is

remanded to the prosecutor for consideration of this application without reliance upon the presumption. (State v. Tarique Angelo Campbell, January 29, 2010; Abby P. Schwartz, A.D.P.D.)

### **PROSECUTORIAL MISCONDUCT**

Convictions reversed by the New Jersey Supreme Court on other grounds. The prosecutor's line of questioning compelled defendant to comment starkly on the credibility of the witnesses against him. If during the retrial the State seeks to emphasize to the jury a lack of believability in the defendant's conspiracy theory, it must do so without asking the defendant repeatedly to comment on whether another testifying witness or witnesses are lying. See also **DEFENDANT'S PRESENCE/ABSENCE**. (Daniel J. Brown, Designated Counsel)

Conviction reversed because defendant's right to a fair trial was violated by the prosecutor's summation. Specifically, the prosecutor suggested that the jury could reach its own conclusions as to how many times prior to this incident the defendant had battered the victim despite the fact that no evidence was admitted concerning prior instances of domestic violence. The two rhetorical questions to the jury asking, "Do you think this is a one time episode in that house?" should not have been posed because there was in actuality no evidence of any prior assaults or prior coercion. This invitation to the jury to speculate could have had a palpable impact on the jury's verdict. Defendant's motion for a mistrial should have been granted." See also **EVIDENCE**. (State v. J.I.F., March 4, 2010; Michael C. Kazer, Designated Counsel)

Conviction reversed by the Appellate Division, who agreed with defendant's contention that the prosecutor's summation exceeded the boundaries of legitimate advocacy when she vouched for the credibility of her witness. The prosecutor's argument that Officer Carrasquillo had "no stake in the outcome of the proceedings" is an instance of prosecutorial misconduct entitling him to a new trial. Defense counsel objected, but the judge overruled the objection by saying in open court, in full hearing of the jury, that the prosecutor's remark was a "fair comment" on the evidence. Thus, not only did the judge err by failing to strike the offending remark, he compounded the harmful effect of the remark by essentially signaling to the jury his agreement with the prosecutor's argument. The judge's comment had the effect of encouraging the jury to utilize the prosecutor's remark in its overall evaluation of whether it was defendant or Carrasquillo who was telling the truth. See also **EVIDENCE**. (State v. Karl Lester Murphy, April 22, 2010; Stephen A. Caruso, A.D.P.D.)

Convictions reversed Appellate Division based on cumulative effect of improper admission of evidence and prosecutor's improper

statements in opening and closing arguments. In this case, the comments of the prosecutor were highly improper. She repeatedly told the jury that police officers had "no reason to lie and to go after this particular defendant," and that they "ha[d] no reason to come in here and tell you anything that isn't the truth," "perjure themselves and ... say things to you that are not true and could impact on their reputations." She emphasized that the officers were "veterans ... not rookies" and that two of them "had about 20 years experience on the job." They were police officers "trying to do what they believe[d] [wa]s right." While defense counsel attacked the officers' credibility, and response to such attacks is generally permissible, the prosecutor's comments in this case far exceeded what was legitimate rebuttal. In her opening statement, the prosecutor told the jury that before the police arrived at 690 South 20th Street on the day in question, they had "obtained a search warrant from Judge Joseph Isabella who is a Judge here in Essex County." Rivera, the State's first witness, began his testimony by telling the jury he was there to execute "a Court authorized search warrant." Almost every officer who testified thereafter indicated the same thing. First, there was never any limiting jury instruction asked for, or provided, regarding the references to the "court ordered" search warrant for the premises. Second, the trial commenced with a reference to the warrant, which was repeated by the State's first witness and by nearly every State's witness thereafter. Thus, references to the search warrant were neither fleeting, nor was the jury ever told of the limited probative value of the evidence. Lastly, the prosecutor's summation specifically sought to explain why only defendant was arrested by repeating that such a decision was "consistent" with the officers' view of the evidence in the case. We do not think it unlikely that the jury could infer that these "veteran" officers, responding to a location where prior drug offenses had occurred, pre-armed with a judicially-issued no-knock search warrant, were similarly prearmed with information, never adduced as evidence at trial, that defendant was the one likely person who might be found at the apartment in possession of the contraband, and the only person guilty of the offenses. Seen in this light, the jury may have improperly disregarded the fact that defendant's verbal admission was not contained in any police report of the incident. See also **EVIDENCE**. (State v. Darryl Proctor, January 5, 2010; Daniel Brown, Designated Counsel)

### **SEARCH AND SEIZURE**

Conviction reversed, suppression ordered by the Appellate Division. Initially, the encounter with Felix amounted to only a field inquiry, as Holman and then Nanos approached him and began asking him questions. There was no illegality or bad faith in the field inquiry here, at least in its initial phases. However, the initial field inquiry in this case progressed into an investigatory

stop under Terry. An investigatory stop, unlike a field inquiry, is characterized by a detention in which the person approached by a police officer would not reasonably feel free to leave, even though the encounter falls short of a formal arrest. Nanos's specific question, asking whether Felix 'had anything illegal on his person,' escalated the field inquiry into a Terry investigatory stop, by insinuating that Felix might have contraband in his possession. Consequently, the motion judge's determination that Nanos's question to Felix about whether he had anything illegal in his possession was "innocuous" and consistent with Terry was incorrect as a matter of law. Nanos asked the question after he had "confirmed that [Felix] was supposed to be on the property," according to Nanos's own testimony. Having satisfied himself that Felix was not trespassing, Nanos offered **nothing amounting to a 'particularized suspicion' that would warrant the specific question asked**. While it is apparently true that the house was a known "crack house," that alone cannot be the basis for the Terry stop of someone who is there with the permission of an owner or resident. He did not know Felix, so there was no testimony that he was a known drug dealer or user. Nanos never expressed any concern about a weapon, nor was that the purport of his question. (State v. Christopher Felix, April 8, 2010; Daniel V. Gautieri, A.D.P.D.)

Conviction reversed, suppression ordered by the Appellate Division. Evidence found during the search incident to Handy's arrest should have been suppressed because the **dispatcher who incorrectly informed the arresting officer that there was an outstanding arrest warrant acted unreasonably** under the circumstances, even though the conduct of the arresting officer himself was reasonable. Rather than a past clerical error, such as neglecting to remove a no-longer valid warrant, the police dispatcher in this case inaccurately reported to the police officer in the field that there was an active warrant for Handy when, in fact, there were significant discrepancies in the spelling of the first name and the date of birth that were not reported at the same time, thereby causing the arrest of the wrong person. Had the police dispatcher reported the discrepancies at the same time as the existence of the warrant, the arresting officer would have attempted to verify that the warrant was for Handy before, rather than after, the arrest. The deterrent value of applying the exclusionary rule in this case is, in our view, quite significant. The police dispatcher is the crucial link between the officer in the field and police headquarters. The officer depends on receiving the correct information from the dispatcher, information such as whether there is or is not an outstanding arrest warrant for the person with whom the officer is then face to face. Failure to extend the requirement of reasonable conduct to the police dispatcher under the circumstances of this case would have considerable potential to dilute the protections against unreasonable search and seizure guaranteed by the New Jersey



Constitution and the Fourth Amendment. (State v. Germaine A. Handy, April 12, 2010; Stephen P. Hunter, A.D.P.D.)

### SENTENCING - MISCELLANEOUS

Conviction and sentence vacated by the Appellate Division, but the Court also addressed a sentencing issue raised by defendant. He urged that the judge was not required to give forty-three months of parole ineligibility since this was not a Brimage [153 N.J. 1 (1998)] plea offer because the State was not offering a sentence less than what the statute required. Clearly, the Brimage Guidelines were not triggered here because the plea agreement did not "provide[] for a lesser sentence [or] period of parole ineligibility." N.J.S.A. 2C:35-12. An eight-year term was in the middle of the mandatory extended term range for a second conviction for CDS distribution under N.J.S.A. 2C:43-6f and N.J.S.A. 2C:43-7a(4). Furthermore, the forty-three-month period of parole ineligibility was above the mandatory minimum term period of three years. Thus, the **plea agreement was not subject to the Brimage Guidelines**. Consequently, the sentencing judge had discretion to sentence defendant to a lesser extended-term sentence than what the prosecutor agreed to recommend and to a lesser period of mandatory parole ineligibility than the plea form indicated. See also **GUILTY PLEAS**. (State v. Bodie Ellis, February 9, 2010; Jay L. Wilensky, A.D.P.D.)

**Domestic Violence Surcharge** vacated, balance of sentence affirmed by the Appellate Division. Defendant challenged the imposition of a \$100 surcharge for his convictions based on acts of domestic violence (DV). N.J.S.A. 2C:25-29.4 provides that "a person convicted of an act of domestic violence, as that term is defined by [N.J.S.A. 2C:25-19a] shall be subject to a surcharge."... Under N.J.S.A. 2C:25-19a "'domestic violence' means the occurrence of one or more of the [listed offenses] inflicted upon a person protected under [the Prevention of Domestic Violence Act]." Neither attempts, generally, nor attempted murder, specifically, are included in N.J.S.A. 2C:25-19a which lists the offenses which can constitute domestic violence. Attempts are proscribed by N.J.S.A. 2C:5-1. See also N.J.S.A. 2C:5-4. The holdings of our courts provide fair notice that, in this area, express inclusion is necessary, and the Legislature has expressly included attempts for purposes of a sentencing provision when it desires to do so. Moreover, the Legislature has provided special grading provisions for attempted murder in N.J.S.A. 2C:5-4a although it did not make attempted murder a specific crime within Chapter 11 of the Code or refer to it for purposes of the DV surcharge. Furthermore, there were no questions at the plea colloquy regarding the relationship between defendant and the victim, and establishing that relationship under the Act is a prerequisite to the imposition of the surcharge. (State v. Joseph Allen Lee, January 19, 2010; Mark

H. Friedman, A.D.P.D.)

After reversing defendant's conviction, the Appellate Division addressed defendant's claim that he was **not given notice, prior to the trial, that the State intended to invoke the Three Strikes Law** and hence he did not have a meaningful opportunity to evaluate what he contends was the State's pretrial plea offer of a fifteen year sentence subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Transcripts of the pre-trial conference support defendant's claim that, at least on the record, he was not advised of his possible exposure to life in prison without parole. Both those transcripts and later discussions in the sentencing transcript also strongly suggest that neither his counsel nor the judges conducting those proceedings were aware, prior to trial, that defendant could be subject to the Three Strikes Law. In fact, based on the colloquy at the sentencing hearing, the prosecutor may also have been unaware of this issue. However, defendant's discussions with his counsel are not of record and would have to be explored in a further evidentiary proceeding. Because defendant's claim rests in part on facts outside the record, it should be explored at a testimonial hearing. Because the outcome of the remand hearing may obviate the need for a second trial, the hearing shall be held prior to the trial. See also **DEFENDANT'S PRESENCE/ABSENCE**. (State v. Michael Stuart, March 30, 2010; Amira R. Scurato, A.D.P.D.)